Supreme Court, U. S.
FILED
OCT 12 1976
MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 76-213

BYRON L. DORGAN, as State Tax Commissioner of and for the State of North Dakota, and his successors in office; STATE TAX COMMISSION OF THE STATE OF NORTH DAKOTA; and STATE OF NORTH DAKOTA,

Appellants

vs.

UNITED STATES OF AMERICA and WESTERN ELECTRIC COMPANY, INCORPORATED,

Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NORTH DAKOTA

APPELLANTS' BRIEF OPPOSING MOTION TO AFFIRM

COUNSEL OF RECORD FOR ALL APPELLANTS, AND UPON WHOM SERVICE IS TO BE MADE:

KENNETH M. JAKES
Special Assistant Attorney General for the State of North Dakota
Office of the State Tax Commissioner
State Capitol
Bismarck, ND 58505

OTHER COUNSEL OF RECORD FOR ALL APPELLANTS:

ALBERT R. HAUSAUER, ROBERT W. WIRTZ
Special Assistants Attorney General for the State of North Dakota
Office of State Tax Commissioner
State Capitol
Bismarck, ND 58505

October, 1976

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1976

NO. 76-213

Byron L. Dorgan, etc., et al, Appellants

v.

United States of America and Western Electric Company, Incorporated

---

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NORTH DAKOTA

APPELLANTS' BRIEF OPPOSING MOTION TO AFFIRM

Pursuant to Rule 16(4) of the Rules of this Court, Byron L. Dorgan, et al, submit this Appellants' brief opposing the motion to affirm the order of the district court.

SCOPE OF TAX CLAIM

On page 2 of their motion to affirm, the United States and Western Electric imply that North Dakota sales and use taxes are claimed only with respect to property acquired by Western Electric for performance of its contract with the United States Department of the Army. The claim of North Dakota for such taxes is not limited to property acquisitions by Western Electric but extends also to various services, such as utility services, purchased by Western Electric (J.S. 7, App. A-4 and A-5, and App. D-10 through D-13). This goes to the merits of the argument on page 5 of the motion to affirm where the appellees assert that "the government's claim to immunity rests upon the argument that Western Electric purchased materials on behalf of the United States and that title to these goods immediately vested in the United States." How does title to such services as telephone service and electricity purchased by Western Electric immediately vest in the United States? Could the district court's finding of substantial probability of success on the merits by the United States and Western Electric, which is one of the traditional prerequisites for injunctive relief (J.S. App. A-2), have been based on immediate vesting in the United States of title

to services purchased by Western Electric? That is unlikely not only on the face of it but for other reasons hereinafter set out under the heading "Claim of Agency".

CLAIM OF IRREPARABLE INJURY

On pages 4 and 5 of their brief the United States and Western Electric argue that the United States would sustain irreparable injury unless the state tax proceedings were stayed because of the possibility of conflicting judgments in the federal and state proceedings that would require the United States to make temporary payment of a substantial sum to Western Electric and that the temporary payment could not be made without first obtaining a congressional appropriation.

The United States would sustain irreparable injury only if payment of the taxes claimed was required by North Dakota law as a condition to contesting their validity in the State's courts. Such is not the case here. Payment of disputed sales and use taxes is not required as a condition precedent to contesting their validity in a North Dakota administrative tax proceeding, nor is it required in a direct action in the North Dakota courts for a declaratory judgment pursuant to Chapter 32-23 of the North Dakota Century Code. See The Boeing Company and the United States v. Omdahl, 169 N.W. 2d 696, (N.D., 1969), the merits of which paralell substantially the merits of this case. The argument that the United States would make a temporary payment to Western Electric for disputed state taxes before a

final determination is had in the federal courts on the claim of sovereign immunity is not realistic as an argument to show irreparable injury to the United States; it is inconceivable to the appellants that the United States would ever make such a temporary payment under those circumstances. The three cases cited in the motion to affirm, on page 5, to support the claim of irreparable injury to the United States are distinguishable because they dealt with either or both of the following: first, a district court order granting a permanent injunction that was based on an unequivocal holding that the state statute involved was unconstitutional, whereas in this case only a temporary injunction based on probable unconstitutionality of the North Dakota statutes is involved; and, second, a district court order granting an injunction because a state statute required prepayment of the taxes and a suit in state court for refund of those taxes as the means of testing their validity, whereas in this case prepayment of the North Dakota sales and use taxes is not required as a condition precedent to testing their validity either in a state administrative proceeding or directly in state court via an action for declaratory judgment.

CLAIM OF AGENCY

On page 5 of their motion the United States and Western Electric argue that:

> "The district court also correctly found (J.S. App. A-6) that there was a strong likelihood that the United

States and Western Electric would succeed on the merits of their claim of immunity. Here, the government's claim to immunity rests upon the argument that Western Electric purchased materials on behalf of the United States and that title to these goods immediately vested in the United States. See, e.g., Kern-Limerick, Inc. v. Scurlock, 347 U.S. 110,117."

Their argument that Western Electric "purchased materials on behalf of the United States", together with their citation of Kern-Limerick, is a clear claim now that Western Electric was acting as an agent of the United States for the purpose of purchasing the materials. This is exactly contrary to their argument in the district court where they specifically informed the court that they were not claiming that Western Electric acted as agent of the United States for the purchase of the materials, presumably because the contract expressly provides that Western Electric, "as an independent contractor and not as an agent of the Government", would furnish the services and supplies described in the contract. (J.S. 6)

Their disclaimer of agency to the district court was made to dispute the statement by the Eighth Circuit Court of Appeals in the related case of United States and Western Electric v. Dorgan, et al, 522 F. 2d 969, that:

"In essence they argue that Western Electricacts under the contract as a federal instrumentality and therefore enjoys the immunity of the Federal Government." See J.S. App. C-2.

No where in its memorandum opinion did the district court suggest that its conclusions were based on such an agency relationship as is now claimed by the United States and Western Electric, but the quotation above from page 5 of the motion to affirm implies otherwise.

The contract here is between the United States Department of the Army and Western Electric and the justification for their claim that Western Electric was an agent of the United States for the purchase of the materials is indeed difficult to understand, not only for the reasons set out above but because of the policy of the United States Department of the Defense against agency-creating clauses in its contracts; in this regard, see the memorandum opinion, filed on July 1, 1976, by the United States District Court for the District of New Mexico in No. 75-425-B Civil, United States of America v. State of New Mexico, et al, (not yet reported), from which the following is quoted from pages 7 and 8 of the opinion as filed:

"It should be noted that, had the Army intended to create an agency relationship, it could easily have put appropriate language in the contracts, as was done in the Kern-

Limerick contract. 347 U.S. at 112, n. 2. It did not do so. It should also be noted that exhibits filed in this action reveal that, at least since 1955, it has been the policy of the Department of Defense not to include in its contracts agency-creating clauses to avoid state and local taxes otherwise payable by its contractors."

That policy of the Defense Department undoubtedly was instrumental in persuading the Congress in 1957 and 1958 to not enact legislation that would have prohibited agency creating clauses in federal contracts and thereby remove the use of them as a device for avoidance of state and local taxes imposed with respect to activities of federal contractors. See the report of the June 11 and 12, 1957, "Hearings Before A Subcommittee Of The Committee On Government Operations United States Senate, Eighty-Fifth Congress, First Session, On S. 6, A Bill To Eliminate Claims Of Immunity From State And Local Taxes Based On Contracts With The United States Or Its Agencies Or Instrumentalities", which hearings were held because of the holding in Kern-Limerick, Inc. v. Scurlock, 347 U.S. 110, and in which report, on page 75, testimony on behalf of the Secretary of Defense included the following:

> "The Department of Defense has established a firm policy against designating contractors on contracts to be performed within the United States as agents of the Government

> for the purchase of supplies and with the right to pledge the credit of the Government in order to avoid the imposition of taxes."

This agency argument by the United States and Western Electric now adds a new dimension to the questions submitted on this appeal because they involve, not only for North Dakota but also for most other states, first, a substantial state interest in the enforcement of state sales and use tax laws against Defense Department contractors and, second, grave questions of public importance as to whether the Department of Defense is acting contrary to its long standing established policy against designating its contractors as agents of the Government for the purchase of supplies in order to avoid payment of state sales and use taxes by its contractors.

CONCLUSION

For these reasons and for the reasons set out in the Jurisdictional Statement, the Appellees' motion to affirm should be denied and the order of

the district court granting the stay (preliminary injunction) should be vacated.

Respectfully submitted,



Kenneth M. Jakes

COUNSEL OF RECORD FOR ALL APPELLANTS:
Special Assistant Attorney General for the State of North Dakota
Office of the State Tax Commissioner
State Capitol
Bismarck, North Dakota 58505

OTHER COUNSEL OF RECORD FOR ALL APPELLANTS:
Albert R. Hausauer and Robert W. Wirtz
Special Assistant Attorneys General for the State of North Dakota
Office of State Tax Commissioner
State Capitol
Bismarck, North Dakota 58505

October, 1976